SUPREME COURT, U.S.
FILED

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98 883 SEP 1 - 1998

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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

LARRY C. WELDON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Larry C. Weldon
P.O. Box 276
Kitty Hawk, NC 27949
(919) 523-8507

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30 RP

QUESTIONS PRESENTED

Whether it comports with the due process notice requirements to allow the IRS to give required notices to a known wrong address under the general rule of law that notice is sufficient if mailed to the address appearing on a taxpayer's last tax return when the IRS has been given specific notice from the taxpayer to use another address.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Court of Appeals issued in support of its judgment is unpublished, but reported as *Larry C. Weldon v. United States*, 1997 U.S. App. LEXIS 32269 (4th Cir. Nov. 18, 1998), and is reprinted in Appendix A.

The opinion of the District Court is published as *Weldon v. United States*, 957 F. Supp. 777 (E.D.N.C. 1997), and is reprinted in Appendix B.

The decision of the Court of Appeals denying a timely petition for rehearing and suggestion for rehearing en banc is unpublished, but reprinted in Appendix C.

JURISDICTION

The opinion of the Court of Appeals in this case was filed on November 18, 1997. A timely petition for rehearing was denied by the Court of Appeals on June 18, 1998. This petition is therefore timely under Supreme Court Rule 13.1 & 3.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves application of the following statutes.

> [N]otice of a deficiency in respect of a tax imposed by subtitle A . . ., if mailed to the taxpayer at the last

known address, shall be sufficient.

26 U.S.C. § 6212(b)(1).

> [N]o assessment of a deficiency in respect to any tax imposed by subtitle A . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer. . . .

26 U.S.C. § 6213(a).

> [T]he Secretary shall, as soon as practicable, and within 60 days, after making an assessment of a tax . . ., give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

26 U.S.C. § 6303(a).

STATEMENT OF THE CASE

Weldon has maintained two mailing addresses for his business since 1982, to wit: (1) P.O. Box 276, Kitty Hawk, NC 27949, and (2) P.O. Box 117, Kitty Hawk, NC 27949 ("Kitty Hawk address"). Weldon also maintained a mailing address of P.O. Box 1464, Kill Devil Hills, NC 27948 ("Kill Devil Hills address"). Weldon's business has been listed in the telephone book with his correct address and telephone number during all of the years at issue.

During 1985, the IRS initiated an examination of a partnership in which Weldon had invested. When Weldon received notice that he was a target of an IRS audit, he executed a Form 2848, Power of Attorney and Declaration of Representative, on October 3, 1985, designating Linda R. Sharp, CPA, Route 1, Box 475, Kill Devil Hills, NC 27948, as his representative.

During 1987, Weldon stopped using his Kill Devil Hills address and caused the various individuals and entities sending mail there to be notified to use the Kitty Hawk address. As part of this effort, Weldon's CPA, Linda R. Sharp, notified the IRS official she was working with during the audits of Weldon's Kitty Hawk address. Sharp executed Form 872A on September 18, 1987, and at the same time requested changes of addresses. The change of address for Weldon was duly noted by an IRS official on October 5, 1987, on a Standard Form 63, which clearly disclosed changes of address for both Weldon and his CPA, Linda Sharp. The IRS's note disclosed Weldon wanted his mail sent to the Kitty Hawk address, and Sharp wanted her address changed to 3003 North Croatan High, Kill Devil Hills, NC 27948.

IRS Disclosure Officer Williams admitted that the Service did receive "clear and concise" notice of where Weldon wanted his mail from the IRS sent, but that the IRS failed to post this address on their computer. "On or about October 5, 1987, the IRS was notified . . . that Mr. Weldon had a different address, P.O. Box 117, Kitty Hawk, N.C. 27949. The I.R.S. did not update its file to include this new address."

On October 5, 1987, L. Porter, Examination Suspense Coordinator with the Memphis Service Center, corresponded

with Weldon at his Kitty Hawk address. Porter informed Weldon that they received the Form 872A for the tax period 1983. Porter stated that their initial report dated September 24, 1987, would be revised as soon as other calculations were completed.

Over two years later, on November 20, 1989, the IRS mailed a Notice of Final Partnership Administrative Adjustment letter concerning its audit of 1983 and 1984 to the Kill Devil Hills address. These notices were returned by the Postal Service unclaimed.

On December 11, 1989, the IRS mailed letters concerning its audit of 1983 and 1984 to the Kill Devil Hills address. These letters were returned unclaimed.

On December 11, 1989, the IRS sent a statutory notice of deficiency for 1986 to the Kill Devil Hills address. A handwritten note on the notice states it was received back from the Postal Service on January 22, 1990 unclaimed.

On December 11, 1989, the IRS sent a statutory notice of deficiency for 1987 to the Kill Devil Hills address. A handwritten note on the notice states it was received back from the Postal Service on January 22, 1990 unclaimed.

On February 28, 1990, the Kill Devil Hills post office box was closed.

On March 7, 1990, the IRS mailed an audit report (30-day letter) concerning 1983 to the Kill Devil Hills address. This letter was returned with the legend, "Box Closed Unable to Forward Return to Sender."

On April 23, 1990, the IRS sent a first notice concerning 1987 to the Kill Devil Hills address. This notice was returned marked, "BOX CLOSED UNABLE TO FORWARD RETURN TO SENDER."

On April 30, 1990, the IRS sent a first notice concerning 1986 to the Kill Devil Hills address.

On May 23, 1990, the IRS sent a final notice concerning 1987 to the Kill Devil Hills address.

On May 28, 1990, the IRS sent a final notice concerning 1986 to the Kill Devil Hills address.

On May 29, 1990, the IRS mailed a notice that an audit for 1987 had begun to the Kill Devil Hills address.

On July 6, 1990, the IRS mailed notices of deficiency for 1982 and 1984 to the Kill Devil Hills address. Both notices returned with the legend, "Box Closed Unable to Forward Return to Sender."

In late July 1990, the Kitty Hawk address was finally imputed into the IRS computer, but the IRS did not begin using the address "because of confusion as to the proper social security number to attribute to the new address."

On August 6, 1990, the IRS sent an examination notice for 1988 to the Kill Devil Hills address. This notice actually ***contained the Kitty Hawk address*** within the document. The Postal Service returned this notice marked "BOX CLOSED UNABLE TO FORWARD RETURN TO SENDER."

On August 24, 1990, IRS sent a Notice of Final Partnership Administrative Adjustment for 1985 to the Kill Devil Hills address. The Postal Service returned the envelope containing the notice on October 5, 1990, marked "BOX CLOSED UNABLE TO FORWARD RETURN TO SENDER."

On August 24, 1990, the IRS sent a Notice of Final Partnership Administrative Adjustment for 1986 addressed to the Kill Devil Hills address. This notice was returned by the Postal Service on October 5, 1990, marked "BOX CLOSED UNABLE TO FORWARD RETURN TO SENDER."

On August 28, 1990, IRS completed Examination Workpapers for the 1983 tax period. A handwritten note on the document states that: "PO Box Closed, but no new address available." On August 31, 1990, IRS mailed a letter with Form 1902-C attached to the Kill Devil Hills address. The Postal Service returned it to the IRS on September 7, 1990. The Postal Service marked the envelope "BOX CLOSED UNABLE TO FORWARD RETURN TO SENDER."

On October 1, 1990, IRS mailed the statutory notice and demand for 1983 to the Kill Devil Hills address. The Postal Service returned the notice on October 12, 1990.

On November 27, 1990, IRS processed Form 5344, Examination Closing Record, for the tax year 1984 by noting that Weldon "Default[ed]" on the 90-day letter.

Numerous other correspondence and due process notices were sent to the Kill Devil Hills address.

No notices were ever sent to Weldon's CPA.

Throughout this period, Weldon's CPA used the Kill Devil Hills address on his tax returns. Weldon's Kitty Hawk address was used on information returns filed with the IRS, and on schedules attached to his tax returns.

When the IRS asserted tax liens on his property, Weldon filed the instant complaint to quiet title. On cross-motions for summary judgment, the central issue was whether Weldon received the two critical notices required by law (notice of deficiency, and final notice and demand for payment).

The district court held that notices sent to the address listed on Weldon's tax return was sufficient even though he gave specific notice to use another address and all correspondence sent to that address was returned to the IRS by the Postal Service. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

This case raises a due process notice question in a setting not specifically decided by this or any federal court. Due process requires the IRS to give a notice of deficiency to taxpayers before assessing tax deficiencies against them and also to give notice of final demand for payment before seeking to collect the deficiency.

It is well settled law, that the notice requirement is met by sending notice to the "last known address" of the taxpayer. The last known address rule has been interpreted as allowing notice to be sent to the address last reported on the taxpayer's tax return until the IRS receives "clear and concise" notice to use another address.

The peculiarity of this case, and the fact found determinative by the Court of Appeals, is that after the IRS received clear and concise notice not to use the address on Weldon's tax return, Weldon's subsequent returns continued to display the old address because he overlooked the wrong address filled in by his CPA when signing his returns.

Weldon urges that once given specific notice not to use an incorrect address and to use a new address, the IRS cannot rely upon the general rule to circumvent due process notice requirements. Especially here, where all subsequent correspondence was returned to the IRS. Further, under these facts, the obligation of the IRS to exercise reasonable diligence has particular vitality.

This Court should issue a writ of certiorari because the decision of the Court of Appeals conflicts with the decision of other Courts of Appeals applying a duty to exercise reasonable diligence.

Further, this Court should issue a writ of certiorari because this Court has not previously considered this important question of federal law applicable to every American filing tax returns.

ARGUMENT

I. The Court of Appeals Erred as a Matter of Law Because Due Process Requires the IRS to Use Reasonable Diligence in Providing Notice to Weldon.

26 U.S.C. §§ 6212 and 6213, prohibits the Government from filing a lien and levying upon a taxpayer's property

without first affording him notice and an opportunity for a hearing. Further, after the IRS makes an assessment, a delegate of the Secretary must "give notice" specifying the amount due and demanding payment thereof. 26 U.S.C. § 6303(a). Both of these notices are required to be mailed to the last known address of the taxpayer.

Weldon gave clear and concise notice to the IRS, directly to the agent auditing him, that he wanted his correspondence sent to the Klitty Hawk address. The United States admitted that the IRS made mistakes on two different occasions concerning Weldon's address and at critical time periods. First, the IRS was given clear and concise notice of where Weldon wanted his correspondence sent, but the IRS admittedly failed to input his last known address to its computerized records. Second, the IRS later imputed Weldon's correct mailing address into its computerized records, but did not immediately use it.

Instead of complying with Weldon's notice of where he wanted his correspondence sent, the IRS mailed notices to the address on his most recently filed tax returns. Consequently, over twenty such notices were returned to the IRS by the Postal Service.

Weldon argued below that when the IRS is aware that the address shown on a return is incorrect before it sends critical notices, it has an obligation to use "reasonable diligence" based on all the surrounding circumstances to ascertain the taxpayer's correct address. In other words, when the IRS knew that notices sent to the address on Weldon's return would not reach him, the IRS is required to do more than mail the notice to that known bad address. Instead, the IRS must make a reasonable effort to ascertain an address at which the taxpayer will receive

the notices.

The District Court ruled that:

> [t]he well established rule is that the IRS is entitled to treat the address appearing on a taxpayer's return as the last known in the absence of clear and concise notification from the taxpayer of a new address. Therefore, since Plaintiff continued to use the Post Office Box 1464 address on his returns after the October 5, 1987 telephone call to the IRS, such notification as was given on October 5, 1987 was countermanded by Plaintiff's subsequent return. In other words, Plaintiff's 1986 tax year return filed October 15, 1987, which utilized the Post Office Box 1464 address, entitled the IRS to use that address to mail notices of tax deficiency to Plaintiff.

App. B-3 (internal citations omitted).

The Court of Appeals *per curiam* decision affirmed the district court's holding. App. A.

The thrust of the decisions below is that when the IRS receives a tax return, the agency can repeatedly send notices to the address on that return even when it knows before sending the critical notices that the address is incorrect; thereby fulfilling the requirements of due process of law. This is contrary to the law of the Fourth Circuit. ***Powell v. Commissioner***, 958 F.2d 53, 55 (4th Cir. 1992) ("The taxpayer's last known address has been defined as that which 'in light of all relevant circumstances, the IRS reasonably may consider to be the address of the taxpayer at the time the notice

of deficiency is mailed.' This inquiry 'requires an examination of the totality of the circumstances' . . . The authorities further require that the commissioner must use reasonably diligence to ascertain the last known address.").

It is also contrary to the law of other circuits. ***Gaw v. Commissioner***, 45 F.3d 461, 465 (D.C.Cir. 1995) ("[I]f before mailing the deficiency notice the IRS becomes aware that the address on the return is incorrect, then the IRS has an equitable obligation, which courts will enforce, to use 'reasonable diligence' based on all the surrounding circumstances to ascertain the taxpayer's correct address"); ***Mulder v. Commissioner***, 855 F.2d 208, 211 (5th Cir. 1989) (same); ***Ward v. Commissioner***, 907 F.2d 517, 521 (5th Cir. 1990) (same); ***Wallin v. Commissioner***, 744 F.2d 674, 676 (9th Cir. 1984) (same); ***Monge v. Commissioner***, 93 T.C. 22, 33 (1989) (same); ***Fernandez v. Commissioner***, 54 T.C.M. 1036 (1987) (same); ***King v. Commissioner***, 88 T.C. 1042, 1048 (1987) (same); ***McPartlin v. Commissioner***, 653 F.2d 1185, 1189-90 (7th Cir. 1981) (same); ***Follum v. C.I.R.***, 128 F.3d 118, 119-20 (2nd Cir. 1997) ("The Commissioner has an obligation to exercise reasonable diligence to ascertain the taxpayer's correct address if prior to mailing the deficiency notice she has become aware that the address last known to the agency may be incorrect"); ***Tadros v. Commissioner***, 763 F.2d 89, 91-92 (2nd Cir. 1985) (same); ***Mulder***, 855 F.2d at 212 (same).

The IRS's conduct is also contrary to general principles of equity. In the entirety of the record, there is not one thread of evidence that shows the IRS even attempted to correctly mail in excess of twenty critical notices to Weldon. If the Government agents had lifted one finger to locate a correct mailing address for Weldon, the IRS would have succeeded in

notifying him, and he would have been afforded due process of law. A simple glance in a telephone directory, or a call to directory assistance, the Department of Motor Vehicles, or Weldon's CPA who had his power of attorney at the time, would have disclosed Weldon's correct address.

The Court of Appeals ignored the critical and dispositive issue that the IRS, through reasonable diligence, should have discovered that the address for Weldon was incorrect on his most recent return. See, e.g., ***Powell***, 958 F.2d at 55-56; ***Gaw***, 45 F.3d at 465; ***Williams v. Commissioner***, 935 F.2d 1066, 1067 (9th Cir. 1991). Not only was the IRS specifically notified not to use the address, but in excess of twenty returned notices informed the IRS that the address was wrong.

Weldon's notice was sufficient to overcome the IRS's default position of using the address shown on his return for the taxable period. See e.g., ***DeWelles v. United States***, 378 F.2d 37, 39 (9th Cir.), ***cert. denied***, 389 U.S. 996 (1967); ***Davis v. Commissioner***, 661 F.Supp. 733 (M.D.Ala. 1987) (notice sent to address of wife's former husband was not notice to wife's last known address when sent after wife had verbally informed IRS agents that she had separated from husband); ***Grafton v. United States***, 563 F.Supp. 39 (W.D.Mo. 1983); ***Mollett v. Commissioner***, 82 T.C. 618 (1984, *aff'd without published opinion*, 757 F.2d 286 (11th Cir. 1985); ***Westphal v. Commissioner***, 64 TCM (CCH) 1041 (1992) (verbal notice given three weeks before issuance of deficiency notice sufficient).

If the IRS communicates with the taxpayer at a new address before a notice is issued, then a change in address generally will have been effected. ***Pyo v. Commissioner***, 83 T.C. 626 (1984);

Crum v. Commissioner, 635 F.2d 895, 900 (D.C. Cir. 1980) (correspondence from Service Center where return filed to taxpayer at new address indicative of Commissioner's knowledge of new address). This rule applies even though the communications to the taxpayer at the new address are with reference to a taxable year other than the one subject to the statutory notice of deficiency. ***Pyo***, 83 T.C. 626.

On October 5, 1987, L. Porter, Examination Suspense Coordinator with the Memphis Service Center, corresponded with Weldon at the Kitty Hawk address. Porter informed Weldon that they received Form 872A for the tax period 1983. Porter stated that their initial report dated September 24, 1987, would be revised as soon as the other flow-through results from the other entities were completed. Clear notification to, or knowledge by, an audit agent within the same Internal Revenue District conducting the civil investigation of a taxpayer's new address has been found adequate to effect a change in the taxpayer's address. ***Weinroth v. Commissioner***, 74 T.C. 430 (1980); ***McPartlin***, 653 F.2d 1185 (knowledge of change of address by agent in criminal investigation division in same District Office as agent conducting civil investigation entitled to some weight in determining last known address); ***Berg v. Commissioner***, 65 T.C.C. (CCH) 2004, 2007 (1993) (knowledge of Special Agent imputed to Audit Division). Similarly, knowledge of the IRS Service Center has been imputed to the Audit Division in the same District. ***Cool Fuel v. Connett***, 685 F.2d 309, 312-13 (9th Cir. 1982).

Although Weldon's CPA erred by using the Kill Devil Hills address on his returns, this mistake should not justify a denial of Weldon's due process rights and absolve the IRS of its obligation to use reasonable diligence to ascertain a correct

mailing address for him. The IRS became aware before mailing the critical notices that the address on his returns was incorrect. Here, the specific agent conducting the audits which resulted in the notices and assessments was given personal notice of the Kitty Hawk address. Considering this fact, the IRS should not be allowed to circumvent due process by sending required notices to a known bad address because Weldon's tax returns mistakenly bore his old address.

CONCLUSION

Because this petition raises an important due process notice question applicable to every American taxpayer that has not been decided by this or any other federal court, this Court should issue a writ of certiorari. A writ is further justified because the opinion of the Court of Appeals is contrary to the applicable principles expressed in numerous appellate decisions of the federal courts.

Respectfully submitted,

Larry C. Weldon
P.O. Box 276
Kitty Hawk, NC 27949
(919) 523-8507

APPENDIX A

LARRY C. WELDON, Plaintiff - Appellant, v.
UNITED STATES OF AMERICA, Defendant - Appellee.

No. 97-1266

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

1997 U.S. App. LEXIS 32269

November 18, 1997, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 129 F.3d 1262, 1997 U.S. App. LEXIS 37268.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. Terrence W. Boyle, District Judge. (CA-95-59-2-BO-2).

DISPOSITION: AFFIRMED.

COUNSEL: Larry C. Weldon, Appellant Pro Se. Bruce Raleigh Ellisen, Janet A. Bradley, Theodore M. Doolittle, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

JUDGES: Before WIDENER and LUTTIG, Circuit Judges,

and BUTZNER, Senior Circuit Judge.

OPINION:

PER CURIAM:

Appellant appeals the district court's order awarding summary judgment to the United States in this quiet title action. We have reviewed the record and the district court's opinion accepting the recommendation of the magistrate judge and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *Weldon v. United States,* 957 F. Supp. 777 (E.D.N.C. 1997). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the [*2] decisional process.

AFFIRMED.

APPENDIX B

LARRY C. WELDON, Plaintiff, v.
UNITED STATES OF AMERICA, Defendant.

No. 2:95-CV-59-BO(2)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, NORTHERN DIVISION

957 F. Supp. 777; 1997 U.S. Dist. LEXIS 1414; 97-1 U.S. Tax Cas. (CCH) ¶50,273; 79 A.F.T.R.2d (RIA) 967

January 24, 1997, FILED

PRIOR HISTORY: [**1] Magistrate's Document of October 16, 1996, Reported at: 1996 U.S. Dist. LEXIS 16486.

DISPOSITION: Plaintiff's Motion for Summary Judgment DENIED and Defendant's Motion for Summary Judgment GRANTED. Defendant's Motion to Amend GRANTED.

COUNSEL: LARRY C. WELDON, plaintiff, Pro se, Kitty Hawk, NC. For UNITED STATES OF AMERICA, defendant: Lawrence P. Blaskopf, U. S. Department of Justice, Trial Attorney, Tax Division, Washington, DC.

JUDGES: TERRENCE W. BOYLE, UNITED STATES DISTRICT JUDGE

OPINIONBY: TERRENCE W. BOYLE

OPINION: [*777] ORDER

This matter is before the undersigned on recommendation of a United States Magistrate **[*778]** Judge that summary judgment be allowed to the Defendant. The magistrate judge has also recommended that the Defendant's motion to amend be allowed and that Plaintiff's motion for summary judgment be denied. The Plaintiff has received notice of this and objects to the magistrate judge's recommendation. The court has reviewed the objections and the record de novo.

After reviewing the record and making an independent determination of the facts, the court finds that the magistrate judge's recommendation is correct and that the Internal Revenue Service (IRS) was entitled to use the address used as the Plaintiff's last known address for notice purposes.

BACKGROUND

Plaintiff filed **[**2]** his complaint on September 27, 1995, as a quiet title action against the United States resulting from tax assessments and subsequent filing of notices of liens. Plaintiff owes taxes for tax years 1982, 1983, 1984, 1986, 1987, 1989, and 1990. Defendant filed federal tax liens against Plaintiff's real property in Camden and Dare Counties within this judicial district, and his real property located in the city of Virginia Beach, Virginia.

DISCUSSION

Plaintiff claims that the liens are invalid and defective because Defendant failed to mail notices of tax deficiency to what Plaintiff claims was his "last known address"; and that Plaintiff was thereby deprived of notice and demand for payment of taxes. Plaintiff claims that his correct "last known

address" was Post Office Box 117, Kitty Hawk, North Carolina 27949 (Post Office Box 117) and that Defendant was notified of this by telephone sometime around October 5, 1987. Defendant sent the notices and demands in question to Post Office Box 1464, Kill Devil Hills, North Carolina 27948 (Post Office Box 1464) which had previously been Plaintiff's address. Plaintiff therefore argues that notices and demands sent by Defendant subsequent to **[**3]** October 5, 1987 should not have been sent to his old address because his correct "last known address" was Post Office Box 117.

Plaintiff's argument is undercut by the fact that he continued to use the Post Office Box 1464 address on his tax returns after October 5, 1987. n1 The well established rule is that the IRS is entitled to treat the address appearing on a taxpayer's return as the last known in the absence of clear and concise notification from the taxpayer of a new address. *Powell v. C.I.R.*, 958 F.2d 53, 55 (4th Cir. 1992); *Pomeroy v. United States*, 864 F.2d 1191, 1194 (5th Cir. 1989); *United States v. Zolla*, 724 F.2d 808, 810 (9th Cir.), *cert. denied*, 469 U.S. 830, 83 L. Ed. 2d 59, 105 S. Ct. 116 (1984). Therefore, since Plaintiff continued to use the Post Office Box 1464 address on his returns after the October 5, 1987 telephone call to the IRS, such notification as was given on October 5, 1987 was countermanded by Plaintiff's subsequent return. In other words, Plaintiff's 1986 tax year return filed October 15, 1987, which utilized the Post office Box 1464 address, entitled the IRS to use that address to mail notices of tax deficiency to Plaintiff.

n1 Plaintiff first informed the IRS of the Post Office Box 1464 address when he filed his 1980 and 1981 tax returns in December 1982. Thereafter, Plaintiff filed returns using the Post

Office Box 1464 address on the following dates: 1982 tax year return filed April 15, 1983; 1983 tax year return filed October 22, 1984; 1984 tax year return filed October 15, 1985; 1985 tax year return filed October 20, 1986; 1986 tax year return filed October 15, 1987; 1987 tax year return filed October 17, 1988; 1988 tax year return filed October 15, 1989; 1989 tax year return filed September 12, 1991; and 1990 tax year return filed September 12, 1991. **[**4]**

In conclusion, Plaintiff's Motion for Summary Judgment is DENIED and Defendant's Motion for Summary Judgment is GRANTED.

Defendant's Motion to Amend is not contested by Plaintiff and is supported by well-grounded fact and law. Accordingly, Defendant's Motion to Amend is GRANTED.

SO ORDERED.

This 18th day of January, 1997.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff

Larry C. Weldon recover nothing of defendant United States of America, and this case is DISMISSED.

January 24, 1997

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 18, 1998

No. 98-1266
CA-95-59-2-BO-2

LARRY C. WELDON
Plaintiff - Appellant

v.

UNITED STATES OF AMERICA
Defendant - Appellee

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court.

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
OCT 26 1998
OFFICE OF THE CLERK

No. 98-383

In the Supreme Court of the United States

OCTOBER TERM, 1998

LARRY C. WELDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the notices of deficiency were sent to petitioner at his "last known address" (26 U.S.C. 6212(b)).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-383

LARRY C. WELDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 129 F.3d 1262 (Table). The opinion of the district court (Pet. App. B1-B5) is reported at 957 F. Supp. 777.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1997. The petition for rehearing with suggestion for rehearing en banc was denied on June 18, 1998 (Pet. App. C1). The petition for a writ of certiorari was filed on September 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1982, petitioner filed income tax returns for the 1980 and 1981 tax years that showed his address as P.O. Box 1464, Kill Devil Hills, North Carolina 27948 (R. 23, at 2). All of the tax returns that petitioner filed through 1990 continued to use that same address (Tr. 82-84, 87; R. 23, at 2-3).

During 1987, petitioner learned that the Internal Revenue Service was auditing his tax returns for 1982, 1983 and 1984 (R. 23, at 3). On October 5, 1987, someone other than petitioner telephoned an employee of the IRS and stated that petitioner had moved to a new address (*ibid.*; see Tr. 28, 58-59). Ten days after that phone call, however, petitioner filed his 1986 tax return which still used the Kill Devil Hills post office box address (Gov't Exh. I; R. 23, at 3-4). He continued to use that address on all of the tax returns that he filed through the 1990 return, which he filed on September 12, 1991 (Tr. 82-84, 87; R. 23, at 2-3). Petitioner testified that, although he moved out of Kill Devil Hills in 1986 or 1987, he kept his post office box and retrieved mail from the box about once a month (Tr. 24, 26-27, 38-39, 50, 98-99).

Petitioner's Kill Devil Hills post office box was closed on February 28, 1990, for failure to pay rent (R. 23, at 4). He did not discover that the box had been closed until one or two months later (Tr. 26-27, 98-99). He did not attempt to reopen the box, did not provide the Kill Devil Hills Post Office with a forwarding address and did not make any attempt to provide the IRS with a new address (Tr. 28, 52; R. 23, at 4).

2. Shortly before the Kill Devil Hills box was closed in February 1990, the IRS had mailed correspondence concerning tax deficiencies to petitioner at that address

(R. 23, at 4-5). Four mailings were returned in November and December 1989 because petitioner failed to claim them. Beginning in March 1990, the IRS began receiving returned mailings stamped "BOX CLOSED UNABLE TO FORWARD RETURN TO SENDER" (R. 23, at 4-5). Although the IRS had not received any change of address information from petitioner in connection with the closing of the post office box, the Service investigated and determined that the address used for petitioner should be changed to P.O. Box 276, Kitty Hawk, North Carolina 27949 (Decl. ¶ 9; R. 23, at 5). The record does not establish the precise steps used by the IRS in arriving at the new Kitty Hawk address for petitioner.

The Kitty Hawk address was used by the IRS in mailings sent to petitioner in December 1990 and February 1991, which he apparently received (R. 23, at 5-6). On September 12, 1991, however, petitioner filed his 1989 and 1990 returns using the Kill Devil Hills address (Gov't Exhs. W, X). As the result, in accordance with its ordinary procedures, the IRS updated its records and reverted to using the Kill Devil Hills address for petitioner (Decl. ¶ 10; R. 23, at 4, 6). The IRS thereafter issued notices of federal tax liens to petitioner at that address with respect to his unpaid federal income tax liabilities for the years 1982-84, 1986-87 and 1989-90.

3. a. Petitioner brought this action in district court to enjoin collection of his outstanding taxes and to quiet title to various real properties owned by him to which the federal tax liens attached. Petitioner asserted that his tax obligations were unenforceable because the IRS had allegedly failed to send notices of deficiency and notices and demands for payment of taxes to his "last known address," as required by 26 U.S.C. 6212(b). Petitioner asserted that, because the IRS should have been

aware that the last known address in its files (the Kill Devil Hills address) was incorrect, the agency had a duty to exercise due diligence to ascertain the correct address.

In recommending that summary judgment be granted to the government, the magistrate judge stated that the "nub of this dispute is whether [petitioner's] persistent use of the [Kill Devil Hills] address over this entire period, at least in terms of filing returns, is a sufficient circumstance for the IRS to use that address for purposes of mailing notices of deficiency, assessments, demands, etc.—*i.e.*, is the [Kill Devil Hills address] plaintiff's last known address" (R. 23, at 7-8). The magistrate concluded that the IRS was entitled to rely on address information on petitioner's income tax returns because petitioner had failed to give the agency "clear and concise" notification that he wanted another address used (*id.* at 8-9). The magistrate noted that "[i]t is plain to see from [petitioner's deposition] testimony that [petitioner] expects the government to do what he is unable or unwilling to do for himself—*i.e.* keep up with his own affairs" (*id.* at 13). Because petitioner consistently reported the Kill Devil Hills address on his returns and never effectively notified the IRS of any new address, the magistrate concluded that the IRS was entitled to rely on the Kill Devil Hills address as his last known address (*ibid.*).

b. The district court agreed with the magistrate's recommendation (Pet. App. B2). The court noted that, although someone other than petitioner called the IRS and provided new address information for petitioner on October 5, 1987, this notification "was countermanded" by petitioner on October 15, 1987, when he filed his 1986 tax return using the Kill Devil Hills address (Pet. App. B3). Petitioner thereafter made no further at-

tempt to inform the IRS of any new address. Instead, he continued to use the invalid Kill Devil Hills address on subsequent returns. The IRS was therefore "entitled * * * to use [the Kill Devil Hills] address to mail notices of tax deficiency to [petitioner]" (*ibid.*).

c. The court of appeals affirmed "on the reasoning of the district court" (Pet. App. A2).

ARGUMENT

The decision below is correct and, on the specific question presented, does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. In order to establish a valid tax assessment, lien or levy, the Internal Revenue Service is required to send certain notices to a taxpayer's "last known address." See 26 U.S.C. 6212, 6303. In the usual case, a deficiency in income tax may not be assessed or collected until after the taxpayer has been given notice of the deficiency and an opportunity to litigate the merits in the Tax Court prior to payment of the taxes in dispute. 26 U.S.C. 6213(a). The Commissioner is authorized under 26 U.S.C. 6212(a) to use certified or registered mail to notify a taxpayer that a deficiency has been determined against him. The notice of deficiency "shall be sufficient" if it is mailed to the taxpayer at his "last known address." 26 U.S.C. 6212(b).

If the taxpayer does not file a timely Tax Court petition, the deficiency shall then be assessed and the tax "shall be paid upon notice and demand." 26 U.S.C. 6213(c). An assessment is unenforceable, however, if it is based upon a notice of deficiency that is determined to be invalid because it was not mailed to the taxpayer's "last known address." 26 U.S.C. 6213(a). If the normal 3-year statute of limitations on assessment and collec-

tion specified in 26 U.S.C. 6501(a) has expired by the time a notice of deficiency has been determined to have been invalid, it is ordinarily too late for the Commissioner to issue another notice of deficiency, and the taxes are therefore uncollectible.

The requirement that a notice of deficiency be sent to the taxpayer is satisfied by the mailing of the notice of deficiency to the taxpayer's "last known address," whether the taxpayer in fact receives the notice or not. *E.g.*, *Balkissoon* v. *Commissioner*, 995 F.2d 525, 528 (4th Cir. 1993). The "statutory scheme . . . provides a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer." *Id.* at 528 (quoting *Jones* v. *United States*, 889 F.2d 1448, 1450 (5th Cir. 1989)).

b. The term "last known address" as used in Section 6212(b) is not defined in the Internal Revenue Code or in any regulation. Congress enacted this provision to relieve the Commissioner of the "obviously impossible [task of keeping] an up-to-date record of taxpayers' addresses." H.R. Rep. No. 2, 70th Cong., 1st Sess. 22 (1927). The term "last known address" has been interpreted to mean "the taxpayer's last permanent address * * * known by the Commissioner or the last known temporary address of a definite duration to which the taxpayer has directed the Commissioner to send all communications." *Crum* v. *Commissioner*, 635 F.2d 895, 898 (D.C. Cir. 1980).

The taxpayer has the duty to keep the IRS informed of his current address (*Goulding* v. *United States*, 929 F.2d 329, 331 (7th Cir. 1991)) and must show that he gave the IRS "clear and concise notice" of any claimed

change of address. *King* v. *Commissioner*, 857 F.2d 676, 679 (9th Cir. 1988). "Clear and concise notice" is notice by which the taxpayer indicates to the IRS that he wishes the new address to replace all old addresses in subsequent communications. *Cyclone Drilling, Inc.* v. *Kelley*, 769 F.2d 662, 664 (10th Cir. 1985). The notification must be in writing. See *Houghton* v. *Commissioner*, 48 T.C. 656, 661 (1967); 13 *Mertens Law of Federal Income Taxation* § 49C.17, at 29 (1995 & Supp. 1998) (hereafter *Merten's*). The taxpayer may give such clear and concise notice by filing a subsequent return bearing a new address. *King* v. *Commissioner*, 857 F.2d at 679. Absent some notification to the contrary, a taxpayer's last known address is the address set forth on his most recently filed and processed return. *Ibid.*

c. The fact that the taxpayer has failed to show that he gave the IRS explicit notification of a new address has not always ended the last known address inquiry. Some courts have held that the IRS must exercise "reasonable diligence" in maintaining the last known address in its files. This duty of reasonable diligence is typically discharged, however, when the IRS shows that the notice was mailed to the address on the taxpayer's most recently filed and processed return. *Ward* v. *Commissioner*, 907 F.2d 517, 521 (5th Cir. 1990). See also *Armstrong* v. *Commissioner*, 15 F.3d 970, 974 (10th Cir. 1994) (IRS is entitled to rely on documents submitted by taxpayer); *Eschweiler* v. *United States*, 946 F.2d 45, 49 (7th Cir. 1991) (same).

When the taxpayer shows that at the time the IRS mailed the notice (i) it was unreasonable for the IRS to believe in the efficacy of the last known address in its files and (ii) the IRS was aware of a new address, some courts have held that the duty of reasonable diligence

requires the IRS to mail subsequent notices to the new address regardless of whether the address already in IRS files was the last address of which the taxpayer gave the IRS "clear and concise" notice. See *Gaw* v. *Commissioner*, 45 F.3d 461, 464, 468 (D.C. Cir. 1995); *McPartlin* v. *Commissioner*, 653 F.2d 1185, 1189-1191 (7th Cir. 1981); *Mulder* v. *Commissioner*, 855 F.2d 208, 211-212, amended, 861 F.2d 1333 (5th Cir. 1988). Even in these courts, however, the IRS is entitled to rely on address information contained in documents submitted by the taxpayer, and the taxpayer bears the ultimate responsibility for keeping the IRS informed of address changes. For example, even when mailings from the IRS are consistently returned as undeliverable, a notice of deficiency sent to the address on the taxpayer's latest return will suffice when the taxpayer has not provided the IRS with his new address. *Gille* v. *United States*, 33 F.3d 46, 47-48 (10th Cir. 1994).

The courts that have imposed a requirement of "reasonable diligence" on the IRS have explained that the requirement is equitable in nature. See, *e.g.*, *Gaw* v. *Commissioner*, 45 F.3d at 468. Thus, when the address used by the IRS is a result of the negligence or malfeasance of a taxpayer in informing the agency of an invalid address—as where the taxpayer has provided an invalid address or where the taxpayer has not kept the IRS adequately informed of address changes or has failed to leave a forwarding address with the post office —the requirement of "reasonable diligence" does not apply. See *Eschweiler* v. *United States*, 946 F.2d at 48-50; *Pomeroy* v. *United States*, 864 F.2d 1191, 1194 (5th Cir. 1989). The IRS has been required to look beyond the last known address on file only when the taxpayer has duly kept the IRS apprised of his address and has taken other reasonable steps to insure mail delivery,

such as leaving a forwarding address with the post office. See *McPartlin* v. *Commissioner*, 653 F.2d at 1191 (failure to receive notice due to errors of the IRS or post office, not of the taxpayer); *Mulder* v. *Commissioner*, 855 F.2d at 212 (same).

2. Petitioner seeks to avoid liability for more than $216,000 in taxes and penalties by asserting that the notices of deficiency sent to him at the Kill Devil Hills address were not sent to his "last known address." He seeks to benefit from his own actions in (i) listing as an address on his returns a post office box he was checking only once a month, making it likely that certified mail from the IRS would be returned as unclaimed, (ii) continuing to list the same post office box on his tax returns long after the box was closed for failure to pay rent and (iii) failing to inform either the IRS or the post office of a new address. The opinions of the magistrate judge, the district court and the court of appeals correctly explain that the Commissioner's notices in this case were sufficient for three main reasons.

First, the Kill Devil Hills address was always petitioner's last known address, because petitioner never gave the IRS clear and concise written notification of any other address. Petitioner's only assertion (Pet. 10) that he informed the IRS of an address other than the Kill Devil Hills address involves an October 5, 1987 telephone call to the IRS made by some unknown person other than petitioner. This notification was insufficient both because it was not in writing (*Houghton* v. *Commissioner*, 48 T.C. at 661)[1] and because, as the

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[1] Petitioner implies that the requirement that a change of address notification be in writing was satisfied by the fact that the "change of address for Weldon was duly noted by an IRS official on October 5, 1987, on a Standard Form 63" (Pet. 3). An effective

district court correctly determined (Pet. App. B3), that change of address was countermanded ten days later when petitioner filed his 1986 tax return bearing the Kill Devil Hills address.[2]

Second, the fact that mail is returned to the IRS as undeliverable does not negate the fact that the mail was sent to the "last *known* address" of the taxpayer. The IRS is required only to ascertain (i) that the taxpayer has not given explicit notification of a change in the address shown on the taxpayer's most recently filed return and (ii) that the agency has not otherwise been made aware of any new address. *E.g.*, *Gille* v. *Commissioner*, 33 F.3d at 47-48. Other than the promptly countermanded telephone call of October 5, 1987, there is no indication that petitioner ever provided the IRS with any address other than the Kill Devil Hills address.

Moreover, even if the IRS has an equitable duty to exercise reasonable diligence to ascertain a new ad-

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address change must be submitted in writing by the taxpayer; the requirement of written notification is not fulfilled when an IRS officer records information orally received. Moreover, petitioner's reference to "Standard Form 63" is misleading. The "Standard Form 63" that petitioner describes is not any sort of official IRS change of address form—it is the standard small yellow telephone message pad issued by the Government Printing Office to all government agencies. See Pl. Exh. 5.

[2] Petitioner seeks to rely on the fact that an IRS official sent a letter to petitioner at his Kitty Hawk address on October 5, 1987 (Pet. 13). Petitioner filed an income tax return using the Kill Devil Hills address ten days later, however, which countermanded any prior address instruction. Similarly, after the IRS investigated and obtained an address for petitioner other than Kill Devil Hills and started to use that address in December 1990 (Decl. ¶¶ 9, 14), petitioner filed two returns using the Kill Devil Hills address. Following its usual procedures, the IRS therefore updated its files and reverted to that address (Decl. ¶ 10; R. 23, at 4, 6).

dress for petitioner, that duty may be invoked only by a taxpayer who is himself innocent. See *Powell* v. *Commissioner*, 958 F.2d 53, 56 (4th Cir.) (taxpayers were "entirely innocent," and "ultimate non-delivery of the notice to them was either the fault of the Postal Service Department or the IRS, or both"), cert. denied, 506 U.S. 965 (1992). In this case, neither the IRS nor the post office was responsible for the non-delivery of the notices. Instead, it was petitioner's own failings that caused the misdirection of the notices sent to him: at a time when he knew he was under audit (Pet. 3), he filed tax returns with an incorrect address, failed to provide the IRS with a current address, failed regularly to check his post office box, failed to arrange for the forwarding of his mail, and allowed his post office box to expire for nonpayment. Because it was these actions of petitioner that caused the misdirection of the notices, he cannot seek shelter under an equitable rule of reasonable diligence. As the courts below pointed out (R. 23, at 13):

> It is plain to see from [petitioner's deposition] testimony that [petitioner] expects the government to do what he is unable or unwilling to do for himself —*i.e.*, keep up with his own affairs.

Because petitioner consistently advised the government on his return to employ the Kill Devil Hills address, the IRS was "entitled * * * to use that address to mail notices of tax deficiency to [petitioner]" (Pet. App. B3).

3. Petitioner errs in contending (Pet. 11-12) that the decision in this case conflicts with decisions from other circuits. The other courts that have addressed the question of a duty for the IRS to look beyond the address shown on the taxpayer's most recent return

have made a similar equitable inquiry into whether the taxpayer caused or contributed to the insufficiency of the last known address in the agency's files. *E.g.*, *Marks* v. *Commissioner*, 947 F.2d 983, 986 (D.C. Cir. 1991) (the taxpayer's attempt to benefit from his own failures in providing address information to the government violated the "'chutzpah' doctrine"); *Ward* v. *Commissioner*, 907 F.2d at 521; *Guillen* v. *Barnes*, 819 F.2d 975, 976 (10th Cir. 1987); *McPartlin*, 653 F.2d at 1189-1191; *Rappaport* v. *United States*, 583 F.2d 298, 300-301 (7th Cir. 1978) (when taxpayer left no forwarding address, mailing notice to last known address known to be invalid was sufficient); accord 13 *Mertens*, *supra*, § 49C.19, at 35 (IRS will not be penalized where taxpayer fails to cooperate in providing directions for proper transmission of mail). The cases cited by petitioner as conflicting with the decision in this case either present dissimilar factual contexts or are fully consistent with the government's position in this case.[3]

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[3] In *Gaw* v. *Commissioner*, 45 F.3d 461, 467-468 (D.C. Cir. 1995), the taxpayer made substantial efforts to apprise the IRS of his whereabouts, of his desire that any notice be sent to his representative, and of the fact that taxpayer was going to be away from the last known address in the IRS's files for at least one year. In *Follum* v. *Commissioner*, 128 F.3d 118, 120-121 (2d Cir. 1997), the taxpayer's claim was denied because he failed to inform the IRS of his new address. In *Gille* v. *United States*, 33 F.3d 46, 47-48 (10th Cir. 1994), the court reached the same conclusion on similar facts and also upheld the validity of multiple mailings that were returned as undeliverable. In *Williams* v. *Commissioner*, 935 F.2d 1066, 1067 (9th Cir. 1991), the court held that the IRS is entitled to a reasonable period of time to process a taxpayer's change of address. In *Ward* v. *Commissioner*, 907 F.2d 517, 518, 522 (5th Cir. 1990), the court granted relief to a taxpayer when the IRS had failed properly to process a duly submitted change of address letter. In *Mulder* v. *Commissioner*, 855 F.2d 208, 212,

Finally, we note that the determination that the notices of deficiency were sent to the "last known address" and are therefore valid does not leave petitioner without a remedy if he wishes to contest the merits of the deficiency determinations. Petitioner, like all other taxpayers, can contest his liability by paying the taxes, filing a claim for refund and bringing a refund suit in district court or the Court of Federal Claims. See 26 U.S.C. 7422(a); 28 U.S.C. 1346(a)(1), 1491(a): *Marks* v. *Commissioner*, 947 F.2d at 986 n.2; *Tadros* v. *Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985).

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amended, 861 F.2d 1333 (5th Cir. 1988), the court granted relief to a taxpayer when the IRS could not prove that it ever mailed the disputed notices. In *Tadros* v. *Commissioner*, 763 F.2d 89, 92 (2d Cir. 1985), the IRS prevailed when the taxpayer's return with a new address was not filed until *after* the notice of deficiency was sent. In *Wallin* v. *Commissioner*, 744 F.2d 674 (9th Cir. 1984), the court held that the filing of a return showing a new address was effective notice of a change of address even though the taxpayer had changed her name. The court reasoned that the IRS could have found the new address by searching her social security number. *Id.* at 677. In *McPartlin* v. *Commissioner*, 653 F.2d 1185, 1189-1191 (7th Cir. 1981), the court granted relief to the taxpayers when they filed a return bearing a new address well before the IRS mailed a notice of deficiency to the old address. In *DeWelles* v. *United States*, 378 F.2d 37, 39 (9th Cir. 1967), the district court declined to credit taxpayer's testimony that he provided verbal notice of his new address. None of these decisions conflicts with the decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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